No. 91-194

IN THE
SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

-against-

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 37.5, the City of New York, as a political subdivision of the State

of New York, is exercising the right to file a brief amicus curiae in response to the petition for certiorari.

The City of New York has, in addition to the State's own sales tax of 4%, a similar sales tax for its own benefit. At present the tax is imposed and collected by the State. The collected money goes to the State Comptroller and, after deductions for expenses, to a Munincipal Assistance Corporation for the City. After deducting amounts needed to pay obligations incurred for the City, the remainder goes to the City. Thus, any reduction in the amount which may be collected as sales tax or use tax reduces the City's income. New York Laws 1975, ch. 168, §§2, 3, 7.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED IN ORDER TO ALLOW RECONSIDERATION OF THE DECISION IN NATIONAL BELLAS HESS v. ILLINOIS DEPARTMENT OF REVENUE, 386 U.S. 753 (1967).

The City of New York, as amicus curiae, urges the Court to grant certiorari and then to affirm the decision of the North Dakota Supreme Court under review. In doing so, it may be necessary to distinguish or even to repudiate the holdings in National Bellas Hess v. Illinois Department of Revenue, 386 U.S. 753 (1967), and related cases, insofar as they permit out-of-state mail order vendors to avoid state and local sales/use tax withholding requirements.

We submit that those rulings rest on an artificial constitutional analysis that frustrates the states' substantial and legitimate interests in collection of revenue

and in the integrity of their domestic retail markets. Instead of protecting interstate commerce, they give such commerce an unfair advantage over local commerce.

Bellas Hess and related decisions considered the constitutional requirements for a state (or political subdivision) to subject an out-of-state vendor to its sales/use tax withholding statutes. The state sales/use taxes, in general and as relevant here, are imposed on a vendee of retail merchandise who is a resident of the taxing state and who either purchases the merchandise within the state or purchases it outside the state for use within the state. The amount of tax is a specified percentage of the sales price. The state typically requires that the vendor collect the correct amount of tax from the vendee and remit such amount, with appropriate reports, to the state. This Court has

recognized that the cooperation of the vendor is indispensable to collection of the sales/use tax. National Geographic v. California Equalization Board, 430 U.S. 551, 555 (1976). The sales/use taxes are a vital source of revenue in most states.

Bellas Hess and its progeny hold that an out-of-state vendor may be subject to the sales/use tax withholding requirement only if it engages in business activity within the taxing jurisdiction through local employees or agents or if it maintains property therein. An out-of-state vendor whose marketing activities within the jurisdiction consist solely of advertising and the mailing of catalogs to residents, and who fills the resulting orders by mail or common carrier, but who has no employees, agents or tangible property within the taxing jurisdiction, cannot be required, under these cases, to collect the sales/use

tax. It was not significant, in the reasoning of this Court in Bellas Hess and other decision, that the vendor may purposefully and specifically direct its marketing activities to residents of the taxing jurisdiction or that its resulting sales within the jurisdiction are continuous and substantial. The effect of this requirement for a tangible "nexus" is that only businesses which are already subject to the full scope of the state's taxing power may be required to comply with the sales/use tax statutes.

Bellas Hess begins its analysis by characterizing the sales/use tax withholding requirement as a tax "exaction". 386 U.S. at 756. Since the State is deemed to be imposing a "tax" on the vendor, it follows that the State must demonstrate that it is providing services and protections of a value commensurate

with the purported exaction. But, since the out-of-state vendor has no tangible "presence" in the state, it may not, under the Court's decisions, qualify as a beneficiary of the taxing state's governmental benefits and protections. For this reason, Bellas Hess concluded that there is no constitutional basis for the state to exact compliance with its withholding requirements.

There are two important respects in which the Bellas Hess analysis departs from economic reality. The first is in treating the sales/use tax withholding requirement as if it were a tax imposition. In an economic sense, it is no such thing. Clearly, it is the vendee who bears the entire tax burden imposed on any retail transaction. As to the vendor, this Court has recognized that "the sole burden imposed upon the out-of-state seller by

[the sales/use tax withholding requirement] is the administrative one of collecting it." National Geographic v. California Board of Equalization, supra, 430 U.S. at 558. With modern computer technology, the economic impact of this "administrative" burden must be regarded as so de minimis as to be of no substantial constitutional significance.

Economic reality demands that the withholding requirement be regarded not as a tax, but rather as a legal duty on the part of the vendor to comply with the reasonable tax administration laws of the jurisdictions which are the targets of such vendor's deliberate and purposeful marketing activities. Such a duty of compliance rests on the equitable consideration that an out-of-state business should not be permitted to enhance its position in the market place through the opportunities for tax evasion afforded to

local vendees. Viewed in this light, the withholding requirement is analogous to other legal duties properly imposed by the states on out-of-state businesses which lack tangible local "presence", but which "purposefully" direct their activities to local residents. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985).

In this category, this Court has recognized the duty to use reasonable care in the design and manufacture of products placed in the stream of commerce, and to conform to state laws regarding such matter as defamation and contractual obligations. Id. Such duties attach whenever an out-of-state business has "purposefully directed its activities at residents of the forum." Id. Similarly, the proper standard for determination of whether a business should be subject to a state's sales/use tax withholding requirements should be the

foreseeability that such "purposefully directed" marketing activities will result in substantial local sales. Clearly, the contacts of an out-of-state vendor with a jurisdiction in which it regularly solicits, and actually consummates, many millions of dollars in sales are obviously much more than "random, fortuitous or attenuated". Id.

The second fallacy in the Bellas Hess analysis is the proposition that a business must have a tangible presence in a state in order to benefit from such state's governmental services and protection. The more realistic view is that a business engaged in exploiting a local market by any means, whether through the activities of employees or agents, or through the mailing of catalogs, is benefiting from the governmental activities that foster the domestic market. This view is presented in detail in the decision under review. 470

N.W. 2d at 217-19. It also appears to be the unanimous conclusion of all commentators who have considered the issue. Id., at 217. We would point out, in addition, that the three-factor formula for state tax apportionment, repeatedly sanctioned by this Court, incorporates the proposition that the state in which goods are sold, for that reason alone, makes a substantial contribution to the value of a multistate enterprise. See, e.g., Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983).

Bellas Hess also fails to accord proper weight to two substantial and legitimate state interests. The first is, of course, the collection of the states' proper revenues. The North Dakota Supreme Court emphasized the enormous breadth of the modern mail order industry. The consequent avoidance loss of revenue through vendees'

tax evasion is, therefore, very substantial and is particularly grievous to hard-pressed states and localities. In addition, the tax evasion encouraged by Bellas Hess permits out-of-state vendors to compete unfairly against local businesses .

In conclusion, the Due Process and Commerce Clauses should operate, in the area of state taxation, as a shield to protect interstate business from unreasonable or discriminatory taxation. Bellas Hess, to the contrary, countenances the use of those provisions as a sword in the cause of tax evasion and unfair competition, while advancing no legitimate constitutional values. The Court should take this opportunity to correct this situation.

Conclusion

For the foregoing reasons, amicus respectfully requests that the petition for certiorari be granted to reconsider the decision of this Court in Bellas Hess.

Respectfully submitted,

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